

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Comcast Cable Communications, LLC	)	CSR 7470-E
	)	
Petition for Determination of Effective	)	
Competition in Nine Texas Communities	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 14, 2011**

**Released: March 18, 2011**

By the Senior Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION AND BACKGROUND**

1. Comcast Cable Communications, LLC (“Comcast” or the “Company”), filed with the Commission a petition pursuant to Sections 76.7 and 76.907 of the Commission’s rules for a determination that it is subject to effective competition in nine communities in the Houston and Galveston areas of Texas. Comcast alleges that its cable system serving those communities is subject to effective competition pursuant to Section 623(l)(1)(B) of the Communications Act of 1934, as amended (“Communications Act”),<sup>1</sup> and the Commission’s implementing rules,<sup>2</sup> and is therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DIRECTV, Inc. (“DIRECTV”), and DISH Network (“DISH”). Oppositions to the petition were filed by franchise authorities in three of the communities. Comcast then filed individual replies and asked to withdraw its petition as to another community. For the reasons set forth below, we grant the petition based on our finding that Comcast is subject to effective competition in the eight communities listed on Attachment A (the “Communities”).

**A. Procedural Matters**

2. The franchise authorities in four Communities (Lake Jackson, La Marque, Pasadena, and Texas City) moved for extensions of time in which to respond to Comcast’s petition. The Commission ruled on the first three motions that were filed (all but Pasadena’s), granting them in part and also extending Comcast’s time to file its replies (until ten days after the related opposition was filed).<sup>3</sup>

3. Comcast also moved to withdraw one of the Communities (Texas City) from this proceeding.<sup>4</sup> No opposition to the motion was filed. We grant Comcast’s motion, without prejudice to the Company filing a new petition concerning Texas City in the future.

4. One of the Communities (La Marque) filed a timely opposition. The last-filing Community (Pasadena) filed its response on the day requested in its still-pending motion for extension of time. The principal grounds for Pasadena’s motion is that, to the best of its knowledge, it had not timely

<sup>1</sup> See 47 U.S.C. § 543(l)(1)(B).

<sup>2</sup> 47 C.F.R. § 76.905(b)(2).

<sup>3</sup> *Comcast Cable Commun., LLC*, 22 FCC Rcd 16974 (2007).

<sup>4</sup> Motion to Withdraw Texas City, Texas from Petition for Special Relief.

received a copy of the petition. Although motions for extension of time are not routinely granted,<sup>5</sup> Pasadena's grounds are adequate to support its motion, which we grant. Accordingly, Pasadena's opposition is timely.

5. The remaining Community (Lake Jackson) mailed its opposition on the day before it was due to be filed at the Commission. The opposition arrived at the Commission's offices two business days later. Because no party has been prejudiced by this minor delay, we waive any lateness and will consider the City of Lake Jackson's opposition to be timely.

## II. THE COMPETING PROVIDER TEST FOR EFFECTIVE COMPETITION

6. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>6</sup> as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules.<sup>7</sup> The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.<sup>8</sup>

7. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPDs"), each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.<sup>9</sup> This test is referred to as the "competing provider" test.

### A. The First Part of the Competing Provider Test

8. The first part of this test has three elements: the franchise area must be "served by" at least two unaffiliated MVPDs who offer "comparable programming" to at least "50 percent" of the households in the franchise area.<sup>10</sup> It is undisputed that the Communities are "served by" both DBS providers, DIRECTV and DISH, and that these two MVPD providers are unaffiliated with Comcast or with each other. A franchise area is considered "served by" an MVPD if that MVPD's service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service's availability.<sup>11</sup> The Commission has held that a party may use evidence of subscribership in the franchise area (the second part of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.<sup>12</sup> The "comparable programming" element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming<sup>13</sup> and is supported in the petitions with copies of channel

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<sup>5</sup> 47 C.F.R. § 1.46(a).

<sup>6</sup> 47 C.F.R. § 76.906.

<sup>7</sup> See 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905(b).

<sup>8</sup> See 47 C.F.R. §§ 76.906 & -907(b).

<sup>9</sup> 47 U.S.C. § 543(l)(1)(B); see also 47 C.F.R. § 76.905(b)(2).

<sup>10</sup> 47 C.F.R. § 76.905(b)(2)(i).

<sup>11</sup> See Petition at 3.

<sup>12</sup> *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

<sup>13</sup> See 47 C.F.R. § 76.905(g). See also Petition at 4.

lineups for both DIRECTV and DISH.<sup>14</sup> Also undisputed is Comcast's assertion that both DIRECTV and DISH offer service to at least "50 percent" of the households in the Communities because of their national satellite footprint.<sup>15</sup> Accordingly, we find that the first part of the competing provider test is satisfied for all of the Communities.

## **B. The Second Part of the Competing Provider Test**

9. The second part of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceeds 15 percent of the households in a franchise area. Comcast asserts that it is the largest MVPD in the Communities.<sup>16</sup> None of the Communities opposing the petition challenges that Comcast is the largest MVPD. The second part of the competing provider test thus obliges Comcast to establish a ratio for each Community, the numerator of which is the number of DBS subscribers there and the denominator of which is the number of households there. If the ratio is over 15 percent, then Comcast is subject to competing provider effective competition in the Community.

### **1. Comcast's Evidence**

10. Comcast first sought to determine the numerator of the statutory ratio for each Community, the number of DBS subscribers there. The Company obtained from Media Business Corporation ("MBC") a list of the zip codes that covered each Community in whole or in part.<sup>17</sup> Comcast then purchased a subscriber tracking report from the Satellite Broadcasting and Communications Association ("SBCA") that stated the number of DBS subscribers within each of the zip codes on MBC's list.<sup>18</sup> Then, for each zip code that lay partly inside and partly outside one of the Communities (a "partial zip code"), Comcast obtained from MBC an allocation percentage of how many DBS subscribers were in the part of the partial zip code that lay inside the Community.<sup>19</sup> Comcast then applied the allocation percentage to the number of DBS subscribers in each partial zip code, producing an estimate of the number of DBS subscribers in the part of each zip code that lay inside the Community. Finally, the Company summed those numbers of DBS subscribers in each Community and added the numbers of DBS subscribers in zip codes all of which lay inside the Community. The resulting sum was Comcast's estimate of the number of DBS subscribers in each Community.<sup>20</sup>

11. For the denominator of the statutory ratio (the number of households in each Community), Comcast used 2000 Census counts of households in each Community.<sup>21</sup> The resulting ratios show DBS subscribership in excess of 15 percent in each of the Communities.<sup>22</sup> If Comcast's numbers are accepted, they show that the second part of the competing provider test is satisfied in each of them.

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<sup>14</sup> See Petition at Exh. 2.

<sup>15</sup> See *id.* at 2-3.

<sup>16</sup> See *id.* at 5.

<sup>17</sup> Petition at Exh. 4 (Letter from Robert Lehmann of MBC to Davis Wright Tremaine LLP ("Lehmann Letter")).

<sup>18</sup> Petition at 4-6.

<sup>19</sup> *Id.* at 5.

<sup>20</sup> *Id.* at 6-7.

<sup>21</sup> *Id.* at Exh. 7.

<sup>22</sup> *Id.* at Exh. 6.

## 2. The City of Lake Jackson's Opposition

12. Comcast's calculations for Lake Jackson show 2,097 DBS subscribers and 9,588 households, for DBS subscribership of 21.87 percent.

### a. Objections About the Numerator

13. First, the City of Lake Jackson asserts that Comcast erred when it included zip code 77515 within Lake Jackson. The City states that that zip code does not cover any part of Lack Jackson.<sup>23</sup> In response, Comcast assumes that the City is correct. The Company notes, however, that only four DBS customers live in the part of zip code 77515 that Comcast claimed lay within Lake Jackson.<sup>24</sup> We will accept the City's assertion in the interests of brevity and because Comcast does not dispute it. This will reduce Comcast's claimed number of DBS subscribers in Lake Jackson by four.

14. Second, the City challenges MBC's allocation of 94.26 percent of zip code 77566 to Lake Jackson. The City states that the attribution should be "closer to 70%,"<sup>25</sup> but gives no evidence to support that statement. We cannot give credence to a factual allegation that is lacking in supporting testimony or intuitive credibility, especially when Comcast's contrary allegation is supported by a source (MBC) that we have found fully reliable in many cases.<sup>26</sup> Accordingly, we reject the City's proposal to lower the allocation of DBS subscribers in zip code 77566.<sup>27</sup>

15. Third, the City objects that SBCA's count of the number of DBS subscribers in Lake Jackson includes courtesy, complimentary, and other free accounts. The City argues that such accounts should be excluded because they are not "subscribing" to MVPD service and Section 623(l)(1)(B)(ii) of the Communications Act requires that we measure "households subscribing."<sup>28</sup> We count free DBS accounts in the statutory numerator of the competing provider test, most importantly because a resident who receives free DBS service presents a formidable challenge to a cable operator.<sup>29</sup> Such a challenge should not be disregarded in a study of how much competition the cable operator faces. Also, the City has not shown that there is actually a single courtesy, complimentary, or free DBS account in Lake Jackson, much less enough of them to lower DBS subscribership to 15 percent. We reject the City of Jackson's objection to counting such accounts in the numerator of the statutory ratio.

16. Fourth, the City objects that Comcast has not excluded from its count of DBS subscribers "dual subscriber" households, which are households that subscribe to both DBS and cable service.<sup>30</sup> The

<sup>23</sup> Opposition of Lake Jackson, TX to Petition for Special Relief ("Lake Jackson Opposition") at 3.

<sup>24</sup> Reply to Opposition to Petition for Special Relief ("Lake Jackson Reply") at 1-2.

<sup>25</sup> Lake Jackson Opposition at 5.

<sup>26</sup> See, e.g., *Comcast Cable Commun., LLC*, 22 FCC Rcd 6767, 6770, ¶ 6 (2007); *MCC Iowa, LLC*, 20 FCC Rcd 20476, 20478-79, ¶¶ 4-7 (2005); *Comcast Cable Commun., LLC*, 20 FCC Rcd 20438, 20441, ¶¶ 9-10 (2005).

<sup>27</sup> In the alternative, even if we reduced the allocation of DBS customers in zip code 77566 to 70% ( $2220 \times .7 = 1554$ ), DBS subscribership would still be over 15% of the households in Lake Jackson.  $1554 \div 9588 = 16.21\%$ .

<sup>28</sup> Lake Jackson Opposition at 3-4, citing *Ciminelli v. Cablevision*, 583 F. Supp. 158, 161 (E.D.N.Y. 1984) (cable service is "intended for the exclusive use of *paying subscribers*") (italics in original).

<sup>29</sup> See, e.g., *Comcast Cable Commun., LLC*, 25 FCC Rcd 4967, 4972, ¶ 17 (2010) ("*Comcast F*"); *Bright House Networks, LLC*, 22 FCC Rcd 4390, 4394, ¶ 11 (2007) ("*Bright House*"); *Adelphia Cable Commun.*, 20 FCC Rcd 20536, 20540, ¶ 13 (2005) ("A subscriber receiving free DBS service arguably would have to perceive significant choice and service advantages available through the local cable operator to abandon DBS service in favor of cable service."), *application for review pending* ("*Adelphia*").

<sup>30</sup> Lake Jackson Opposition at 7 n.7.

Commission has long included dual subscriber households in counts of DBS subscribers. These households are subscribers to DBS service, a fact that is not altered by their also subscribing to cable service. They are aware of alternatives to cable service and have subscribed to one,<sup>31</sup> showing the existence of strong competition for the cable operator that we should not disregard. Moreover, the City has not shown that there are any dual subscriber households in Lake Jackson, much less enough of them to reduce DBS subscribership significantly. Accordingly, the City's objection is meritless.

17. Fifth, the City objects to Comcast's calculation of approximately 2,100 DBS subscribers in Lake Jackson. The City notes that Comcast's predecessor stated that it had almost 8,000 basic cable subscribers.<sup>32</sup> These numbers add up to slightly over 10,000 MVPD subscribers in Lake Jackson, which is larger than the 2000 Census number of households in Lake Jackson (9,599). Because this is impossible, the City argues, Comcast's number of DBS subscribers is excessive.<sup>33</sup> The claim of 8,000 subscribers made by Comcast's predecessor, however, concerned both Lake Jackson and the neighboring City of Clute.<sup>34</sup> Clute may account for up to 2,000 of the 8,000 subscribers claimed by Comcast's predecessor.<sup>35</sup> Assuming the 2,000 estimate for Clute to be correct, that would make the sum of DBS and cable subscribers in Lake Jackson approximately 8,100, which is credible in a city with 9,599 households.<sup>36</sup> The City has failed to undermine Comcast's estimate of DBS subscribers.

18. Finally, the City suggests that we require Comcast to estimate DBS subscribers in Lake Jackson by using nine-digit zip codes, which are more precise than five-digit zip codes and the MBC allocation percentages that Comcast used.<sup>37</sup> We have repeatedly declined to require the use of nine-digit zip code-based data in showings of competing provider effective competition.<sup>38</sup> The City has given us no reason to depart from that policy in this case. Moreover, the City could have, but did not, purchase its own nine-digit report to refute Comcast's five-digit allocation. Accordingly, consistent with our longstanding practice, we accept the five-digit zip code basis of Comcast's showing of the number of DBS subscribers in Lake Jackson. We conclude that, for purposes of the present proceeding, there are 2,093 DBS subscribers in Lake Jackson.

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<sup>31</sup> See, e.g., *Subsidiaries of Cablevision Systems Corp.*, 23 FCC Rcd 14141, 14145-46, ¶ 17 ("Cablevision"), stay denied, 23 FCC Rcd 17012 (2008), application for review pending; *Adelphia Cable Comm.*, 22 FCC Rcd 4458, 4462, ¶ 13 (2007); *Bright House*, 22 FCC Rcd at 4394, ¶ 11.

<sup>32</sup> Lake Jackson Opposition at 7; *id.* at Exh. A at ¶ 6 & Exh. C at Att. 4.

<sup>33</sup> *Id.* at 6-7.

<sup>34</sup> *Id.* at Exh. C at 2.

<sup>35</sup> The 2000 U.S. Census states that Lake Jackson has a population of 26,386 and Clute has a population of 10,424, which makes Clute's population roughly one quarter of the Cities' combined population. U.S. Census Bureau, *American Fact Finder, Texas – Place*, [http://factfinder.census.gov/servlet/GCTTable?\\_bm=y&-geo\\_id=04000US48&-\\_box\\_head\\_nbr=GCT-PH1&-ds\\_name=DEC\\_2000\\_SF1\\_U&-format=ST-7](http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=04000US48&-_box_head_nbr=GCT-PH1&-ds_name=DEC_2000_SF1_U&-format=ST-7) (visited Dec. 2, 2010).

<sup>36</sup> Even assuming that Clute accounted for only 1,000 subscribers, the sum of DBS and cable subscribers in Lake Jackson (9,100) falls below the 2,000 Census figure (9,599).

<sup>37</sup> Lake Jackson Opposition at 7-8.

<sup>38</sup> See, e.g., *Time Warner Cable Inc.*, 25 FCC Rcd 5457, 5461-62, ¶¶ 14-16 (2010) ("*Time Warner*"), application for review pending; Public Notice, *Commission Clarifies Standards for Evidence of Competing Provider Effective Competition for Cable Service*, 24 FCC Rcd 8198 (2009); *Bright House*, 22 FCC Rcd at 4394, ¶ 11.

**b. Objections About the Denominator**

19. The City of Jackson Lake challenges Comcast's use of the 2000 Census, which states that there were 9,588 households in Lake Jackson.<sup>39</sup> The City points to other data stating larger numbers of "housing units" in Lake Jackson.<sup>40</sup> Remarkably, the source of one of the City's proposed numbers expressly disclaims that its data is necessarily accurate.<sup>41</sup> More important, what the competing provider test measures is "households," which consist of only occupied housing units.<sup>42</sup> The larger numbers proposed by the City include unoccupied housing units, which are not "households." Accordingly, the City's proposed larger numbers are unacceptable.<sup>43</sup>

20. Second, the City objects that Comcast's count of households includes the 20 percent of the residents of Lake Jackson who live in apartment buildings and other so-called multiple dwelling units ("MDUs"). The City argues that it is difficult or impossible for MDU households to subscribe to DBS service and that, therefore, they should not be counted as households in measuring the competition to which a cable operator is actually subject.<sup>44</sup>

21. The City is simply mistaken when it states that residents of MDUs are legally or physically unable to place receiving dishes on their balconies (or in their windows or on their roofs) and subscribe to DBS service. Such placements are protected by our rules concerning Over the Air Reception Devices, which generally prohibit MDU owners from unreasonably restricting residents' use of receiving dishes for DBS service.<sup>45</sup> In fact, Comcast has presented photographs of MDU housing in Lake Jackson that have DIRECTV and DISH receiving dishes.<sup>46</sup>

22. The City also refers to agreements that contain clauses giving cable operators the exclusive right to serve MDUs. The City complains that such exclusivity clauses deter MDU residents from obtaining DBS service.<sup>47</sup> Such clauses did not prohibit MDU residents from subscribing to DBS service, however; they only barred additional cable operators from the MDUs to which they applied.<sup>48</sup> Moreover, the Commission nullified such clauses when the pleading cycle in this proceeding was still

<sup>39</sup> Petition at Exh. 6, col. J, lines 16-17; *id.* at Exh. 7 at 4.

<sup>40</sup> Lake Jackson Opposition at 4.

<sup>41</sup> Lake Jackson Reply at Att. B, §§ 10.1, 10.3.

<sup>42</sup> *See, e.g., Marcus Cable Assocs, LLC*, 25 FCC 4369, 4372, ¶ 9 (2010) ("*Marcus*"); *Charter Commun.*, 25 FCC Rcd 2289, 2295-96, ¶ 21 (2010); *Cablevision*, 23 FCC Rcd at 14150, ¶ 30.

<sup>43</sup> Lake Jackson Reply at 3-4.

<sup>44</sup> Lake Jackson Opposition at 5-6.

<sup>45</sup> 47 C.F.R. § 1.4000; *see also Comcast Cable Commun., LLC*, 22 FCC Rcd 1691, 1693-94, ¶ 6, *reconsideration granted on other grounds*, 22 FCC Rcd 5320 (2007); *cf. Adelphia*, 20 FCC Rcd at 20537-38, ¶¶ 4-7; *Adelphia Cable Commun.*, 20 FCC Rcd 4979, 4980-81, ¶¶ 4-5 (2005).

<sup>46</sup> Lake Jackson Reply at Att. C.

<sup>47</sup> Lake Jackson Opposition at 5-6, *citing Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 2755, 2829, ¶¶ 138-39 (2005) and *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units & Other Real Estate Developments*, 22 FCC Rcd 5935 (2007).

<sup>48</sup> *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units & Other Real Estate Developments*, 22 FCC Rcd 20235, 20240, ¶ 9 (2007) ("Although exclusivity clauses do not prevent MDU residents from installing receiving dishes and receiving DBS service where the Commission's 'Over the Air Reception Devices' rules apply, they bar new wire-based competitors from MDUs.") (footnote omitted), *aff'd*, *National Cable & Telecommun. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).



underway.<sup>49</sup> Therefore, any barrier that such clauses ever posed to DBS subscribership ceased to exist.

23. Third, the City argues that the prevalence of MDUs should lead us to reduce the “number of DBS households” in Lake Jackson.<sup>50</sup> The City’s argument is without merit. Section 623(l)(1)(B) directs the Commission to define effective competition based on the number of households. The units that comprise an MDU are households and we are statutorily bound to count them in an effective competition determination. We conclude that, for purposes of the present proceeding, there are 9,588 households in Lake Jackson.

**c. General Objections**

24. Finally, the City of Lake Jackson alleges that the deregulation of rates for basic cable service will lead to substantial rate increases, with disproportionate effects on residents of fixed and lower incomes, and will deprive the City of several regulatory powers over Comcast and other MVPD providers.<sup>51</sup> Whatever their accuracy and merits, these allegations are immaterial under Section 623(l)(1)(B) of the Communications Act, however. The statute explicitly states that if a cable operator shows that the number of households subscribing to programming services offered by MVPDs other than the largest one exceeds 15 percent of the households in its franchise area, then that cable operator is entitled to be free of regulation of its rates for basic cable service.<sup>52</sup> The statute leaves no room for the subjects that the City attempts to raise herein.

**3. The City of La Marque’s Opposition**

25. Comcast’s calculations for La Marque show 918 DBS subscribers and 5,237 households, for DBS subscribership of 17.52 percent.

**a. Objections About the Numerator**

26. First, the City of La Marque objects that when MBC made its list of zip codes that cover all or part of La Marque, it listed only two (77510 and 77568) and omitted two (77515 and 77563).<sup>53</sup> An affidavit by the City Manager of La Marque supports this objection.<sup>54</sup>

27. Comcast answers with an affidavit by an MBC executive and a map showing that zip code 77515 is a significant distance from La Marque. Concerning zip code 77563, the MBC executive states that the part of it that is in La Marque probably contains one household.<sup>55</sup> Comcast states that it omitted zip code 77563 from its original filing for the sake of simplicity.<sup>56</sup>

28. Concerning zip code 77515, we do not lightly disregard the sworn testimony of a municipal official about the zip codes that are in his municipality. We find Comcast’s evidence more

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<sup>49</sup> See *supra* note 48.

<sup>50</sup> Lake Jackson Opposition at 6.

<sup>51</sup> *Id.* at 8-9.

<sup>52</sup> 47 U.S.C. § 543(l)(1)(B)(ii).

<sup>53</sup> Opposition of Le[sic] Marque, TX to Petition for Special Relief (“La Marque Opposition”) at 4.

<sup>54</sup> La Marque Opposition at Exh. A (Affidavit of Robert Ewart, City Manager of La Marque, Texas) (“Ewart Affidavit”) at ¶ 5.

<sup>55</sup> Reply to Opposition to Petition for Special Relief (“La Marque Reply”) at Att. A (Declaration of K. Pinna Gallant, MBC Senior Vice President, Product Marketing) at ¶ 4.

<sup>56</sup> La Marque Reply at 3.

convincing, however, particularly its map showing zip code 77515 far from La Marque. Concerning zip code 77563, if we did include it (and its one household and perhaps one DBS subscription), it could not possibly weaken Comcast's case significantly, and it might strengthen it slightly. Accordingly, we do not include zip codes 77515 and 77563 in La Marque for calculating the number of DBS subscribers there.

29. Second, the City objects to MBC allocating 99.66 percent of zip code 77568 to La Marque and argues that a smaller percentage should have been allocated.<sup>57</sup> The City gives no reason or evidentiary support for this proposal. Because it lacks any substantiation, and because we have found MBC's allocations fully reliable in many past cases, we do not accept the City's proposal to reduce the percentage allocation by some unstated percentage.

30. Third, the City objects to the number of households in zip code 77568 that MBC used to calculate its allocation percentage. It appears that MBC started with the 2000 Census number of households in that zip code<sup>58</sup> and modified it to reflect changes in zip code boundaries since 2000, producing 5,241 households.<sup>59</sup> The City proposes two higher numbers of households in La Marque.<sup>60</sup> Neither of them is useful, however. One is a number of all housing units, not households,<sup>61</sup> and we reject it for the reasons we rejected the same kind of proposal by the City of Lake Jackson.<sup>62</sup> The other number<sup>63</sup> is from the same unreliable source we rejected when it was proposed by the City of Lake Jackson.<sup>64</sup>

31. Finally, the City makes the same argument against Comcast's use of five-digit zip codes and in favor of nine-digit zip codes that the City of Jackson Lake made.<sup>65</sup> The City also objects to counting courtesy or complimentary accounts as DBS subscribers.<sup>66</sup> We reject these arguments for the same reason we rejected them when they were made by the City of Lake Jackson.<sup>67</sup> We conclude that, for purposes of the present proceeding, there are 918 DBS subscribers in La Marque.

#### **b. Objections About the Denominator**

32. The City of La Marque objects to Comcast using the 2000 Census number of households in La Marque. In general, the City suggests that the 2000 Census is so old that the Commission should welcome more recent household counts by franchise authorities.<sup>68</sup> Specifically, the City presents an affidavit by the City Manager of La Marque.<sup>69</sup> The affidavit briefly reviews residential housing permits

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<sup>57</sup> La Marque Opposition at 4.

<sup>58</sup> Petition at Exh. 4 (Lehmann Letter) ("MBC then populates the 'split' ZIP code data with 'block-group' level household (HHS) data provided by the 2000 Census.").

<sup>59</sup> Petition, Exh. 6, line 13, col. D.

<sup>60</sup> La Marque Opposition at 3.

<sup>61</sup> *Id.* at Exh. B at 1.

<sup>62</sup> *See* note 42 *supra*.

<sup>63</sup> La Marque Opposition at Exh. B at 4.

<sup>64</sup> *See* note 41 *supra*.

<sup>65</sup> La Marque Opposition at 3, 5; *see supra* note 36.

<sup>66</sup> *Id.* at 4.

<sup>67</sup> *See* ¶¶ 15, 18 *supra*.

<sup>68</sup> La Marque Opposition at 2-3.

<sup>69</sup> The City cites *CC VII Operating, LLC*, 19 FCC Rcd 6199, 6201, ¶ 7 (2004) for the proposition that the Commission has accepted household numbers suggested by city managers. In that case, however, the Commission  
(continued....)



issued since 2000, certificates of occupancy issued since 2000, utility billing accounts, property tax records, and other databases.<sup>70</sup> The City Manager estimates that there are “easily several hundred homes” more in La Marque than there were in 2000, and proposes 5,717 as the number of households there for purposes of this proceeding.<sup>71</sup> This is an increase of 480 over the 2000 Census number and shows growth of 9.2 percent.

33. We do not accept the City Manager’s estimated household number. First, it does not clearly exclude housing units that do not qualify as households, such as unoccupied housing units, assisted living facilities, and dormitories.<sup>72</sup> The City mistaking housing units for households, noted in paragraph 33 above, does not inspire confidence in the City Manager’s number. Also, two factors the City Manager considered (housing permits and certificates of occupancy) are ones that we have considered unacceptable in counting households.<sup>73</sup> Finally, even if we accepted the City’s proposed household number of 5,717 and used Comcast’s proposed number of DBS subscribers (918), DBS subscribership in La Marque would be 16.06 percent, still above the statutory minimum. For the reasons set forth above, the City’s proposed number of households is not sufficiently reliable and, even if it were reliable, we would still conclude that effective competition exists in La Marque. We conclude that, for purposes of the present proceeding, there are 5,237 households in La Marque.

#### c. General Objections

34. The City of La Marque makes the same general objections to Comcast’s petitions that the City of Lake Jackson made.<sup>74</sup> We reject these objections for the reasons stated above.<sup>75</sup>

#### 4. The City of Pasadena’s Objections

35. Comcast’s calculations for Pasadena show 7,384 DBS subscribers and 47,031 households, for DBS subscribership of 15.70 percent.

#### a. Objections About the Numerator

36. First, the City of Pasadena objects generally that Comcast’s petition lacks enough supporting documentation about how MBC decided what zip codes lie wholly or partly within Pasadena<sup>76</sup> and how SBCA allocates DBS subscribers to zip codes.<sup>77</sup> We reject this objection for the reasons we have rejected similar objections in previous decisions.<sup>78</sup> The objection is merely a request for more

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accepted a higher household number proposed by a city manager only “for purposes of argument.” The cited case does not generally endorse household numbers proposed by city managers.

<sup>70</sup> Ewart Affidavit at ¶ 4.

<sup>71</sup> *Id.*

<sup>72</sup> See, e.g., *Marcus*, 25 FCC Rcd at 4372, ¶ 9; *Coxcom, Inc.*, 22 FCC Rcd 4533, 4538, ¶ 13 (2007) (“*Coxcom*”).

<sup>73</sup> See, e.g., *Cablevision of Rockland/Ramapo Inc.*, 22 FCC Rcd 11487, 11493-94, ¶ 17 (2007), *application for review pending*; *Coxcom*, 22 FCC Rcd at 4538-39, ¶ 13; *Cablevision of Raritan Valley, Inc.*, 19 FCC Rcd 6966, 6968, ¶ 6 (2004), *application for review pending*.

<sup>74</sup> La Marque Opposition at 5-6.

<sup>75</sup> See ¶ 24 *supra*.

<sup>76</sup> Response to Petition for Special Relief (“Pasadena Opposition”) at 2.

<sup>77</sup> *Id.* at 3.

<sup>78</sup> *Marcus*, 25 FCC Rcd at 4373, ¶ 10; *Time Warner*, 25 FCC Rcd at 5461, ¶ 13; *Comcast Cable Commun., LLC*, 24 FCC 1780, 1785, ¶¶ 16-17 (2009) (“*Comcast II*”), *application for review pending*; *Cablevision*, 23 FCC Rcd at

(continued....)

information without any indication that the information that MBC and SBCA have already produced suffers from any significant omission, technical flaw or analytical unsoundness. Nor has the City given an indication of what additional supporting documentation would add to the record herein except volume. Requiring a more detailed description of MBC's and SBCA's processes would add complexity and delay to these proceedings without any likelihood on the present record that an error would be revealed or a sounder result would occur. Accordingly, we reject the City's vague request for more information from MBC and SBCA.

37. Second, the City alleges that Pasadena consists of only six zip codes and that MBC mistakenly included six additional zip codes that do not cover any part of that city, thus overstating the number of DBS subscribers and DBS subscribership there.<sup>79</sup> The basis for the City's statement is that the web page of the U.S. Postal Service associates only the first six zip codes with Pasadena. If only these zip codes are used to calculate Comcast's number of DBS subscribers in Pasadena, there are only 6,820 such subscribers.<sup>80</sup>

38. The City's reliance on the Postal Service's web page is misplaced. The lists there are of zip codes that are primarily associated with municipalities for purposes of mail delivery. Those lists do not purport to precisely track the political boundaries of municipalities.<sup>81</sup> Comcast's reply shows that the Postal Service's web page associates certain streets with neighboring municipalities although they are unquestionably in Pasadena.<sup>82</sup> An MBC executive confirms that, according to the MBC standards on which we have long relied, parts of the six additional zip codes are within the political boundaries of Pasadena.<sup>83</sup> We find Comcast's showings more convincing than the City's and, accordingly, we reject the City of Pasadena's claim that Comcast has overstated the zip codes that Pasadena includes. We conclude that, for purposes of the present proceeding, there are 7,382 DBS subscribers in Pasadena.

#### **b. Objections About the Denominator**

39. First, the City notes Comcast's use of 2007 data for DBS subscribers and 2000 Census data for households, and objects to the gap in time between the two numbers.<sup>84</sup> We have repeatedly held that the use of a recent DBS subscriber number and a Census-derived household number from several years before, without more, will not cause us to disregard the latter. We may reject a Census count of households when we are presented with a more recent household count that has as much reliability,<sup>85</sup> and the City purports to do so here. It starts with the Census Bureau's 2006 estimate of 48,204 households in

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14146-47, ¶¶ 19-20; *Time Warner Cable Inc.*, 23 FCC Rcd 12210, 12215, ¶ 16, *reconsideration denied*, 23 FCC Rcd 16483 (2008), *application for review pending*.

<sup>79</sup> Pasadena Opposition at 2.

<sup>80</sup> The City proposes 6,882 as its number of DBS subscribers in Pasadena. Pasadena Opposition at 3. We believe the City mistakenly summed all the DBS subscribers in its six proposed zip codes, when it should have summed all the smaller numbers that reflect the allocation percentages that MBC uses to reduce subscriber counts in partial zip codes. The smaller numbers sum to 6,820. This correction reduces DBS subscribership, strengthening the City's case. See Petition at Exh. 6, col. G, lines 26-31, & col. I, lines 26-31.

<sup>81</sup> See *Comcast II*, 24 FCC at 1786-87, ¶ 21.

<sup>82</sup> Reply to Response to Petition for Special Relief ("Pasadena Reply") at Exhs. 2-4.

<sup>83</sup> *Id.* at Exh. 1 (Declaration of Ms. Gallant) at ¶ 4.

<sup>84</sup> Pasadena Opposition at 2.

<sup>85</sup> *Comcast Cable Commun. LLC*, Memorandum Opinion & Order DA 10-1787 at ¶ 11 (rel. Sept. 21, 2010), available at 2010 WL 3641218 (with Erratum); *Time Warner*, 25 FCC Rcd at 5463-64, ¶ 21; *Comcast I*, 25 FCC Rcd at 4971, ¶ 14.

Pasadena.<sup>86</sup> The City's Director of Planning proposes to increase that to 49,853 based on a Planning Department estimate of population, the Director's observations of large numbers of Hispanic families (which "tend to have larger households"), the granting of construction permits, growing school district student population, and other factors.<sup>87</sup>

40. We do not accept the increase proposed by the Director of Planning. If Hispanic families tend to have larger than average numbers of persons living under the same roof, that should limit the growth in the number of households in Pasadena, not increase it.<sup>88</sup> Also, we do not accept the granting of construction permits as a proxy for households, which are housing units that are actually occupied.<sup>89</sup> In this and other respects, it is not clear that Pasadena's Director of Planning was using the definition of "household" that we require.

41. We will, however, use the 2006 Census Bureau estimate of households in Pasadena. We have repeatedly used such updates.<sup>90</sup> The Census Bureau is a reliable source and its estimate is obviously of households, which is precisely what Section 623(l)(1)(B) of the Communications Act requires. We conclude that, for purposes of the present proceeding, there are 48,204 households in Pasadena.

### C. Conclusion

42. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census household data,<sup>91</sup> as reflected in Attachment A, we find that Comcast has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in each of the Communities. Therefore, the second part of the competing provider test is satisfied for each of the Communities. Based on the foregoing, we conclude that Comcast has submitted sufficient evidence demonstrating that both parts of the competing provider test are satisfied and Comcast is subject to effective competition in the Communities listed on Attachment A.

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<sup>86</sup> Pasadena Opposition at Exh. B (Declaration of Tim Tietjens, City of Pasadena Director of Planning), First Attachment.

<sup>87</sup> Tietjens Declaration at ¶¶ 2-4 (quoted words in ¶ 3).

<sup>88</sup> Pasadena Reply at 5.

<sup>89</sup> See note 42 *supra*.

<sup>90</sup> *Comcast Cable Commun.*, 25 FCC Rcd 4782, 4783, ¶ 6 (2010); *CoxCom, Inc.*, 25 FCC Rcd 3233, 3235, ¶ 7 (2010); *Charter Commun.*, 25 FCC Rcd 287, 288, ¶ 7 (2010). We are aware of one decision in which we preferred a 2000 Census count to a 2006 Census estimate, *Coxcom, Inc.*, 23 FCC Rcd 12130, 12134, ¶ 10 (2008). In that case, however, the 2000 Census was not as remote in time as it is now. Also, in both that case and this one, DBS subscribership exceeded 15% whichever household number was used.

<sup>91</sup> Petition at 6-7 & Exh. 7; Pasadena Opposition at Exh. B, First Attachment.

**III. ORDERING CLAUSES**

43. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Comcast Cable Communications, LLC, **IS GRANTED**.

44. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachment A **IS REVOKED**.

45. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>92</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker  
Senior Deputy Chief, Policy Division, Media Bureau

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<sup>92</sup> 47 C.F.R. § 0.283.

## ATTACHMENT A

## CSR 7470-E

## COMMUNITIES SERVED BY COMCAST CABLE COMMUNICATIONS, LLC

<b>Communities</b>	<b>CUIDs</b>	<b>CPR*</b>	<b>Census Households</b>	<b>Estimated DBS Subscribers</b>
Dayton	TX0922	53.83%	2129	1146
Deer Park	TX0806	20.12%	9615	1935
Galena Park	TX0672	16.67%	3054	509
La Marque	TX0514	17.53%	5237	918
Lake Jackson	TX0279	21.83%	9588	2093
Liberty	TX0087	38.46%	2860	1100
Pasadena	TX0252	15.32%	48204	7384
Seabrook	TX0515	20.15%	4094	825

\*CPR = Percent of competitive DBS penetration rate.